United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,306

F 088

DISTRICT OF COLUMBIA,

Appellant,

v.

ROBERT E. JONES,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellant,
District Building,
Washington, D. C. 20004

I N D E X

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT E. JONES	:	
	:	
v	:	C. A. No. 2116-64
	:	
1. UNITED STATES OF AMERICA	:	
a sovereign corporation	:	
2. DISTRICT OF COLUMBIA	:	
a municipal corporation	:	
3. RECREATION BOARD FOR THE	:	
DISTRICT OF COLUMBIA	:	

CIVIL DOCKET

DATE		RELEVANT ENTRIES	
1966			
Aug.	27	Complaint, appearance	filed
Aug.	27	Summons copies (2) and copies (2) of Complaint issued to Deft. # 1. AG ser 9/5/64 DA ser 8/28/64	
Aug.	27	Summons copies (2) and copies (2) of Complaint issued to Defts. # 2 & # 3. Ser 8-28-64	
Sep	17	Answer of defendant #2 to complaint, c/m 9-17-64, Appearance of Chester H. Gray, John A. Earnest and James M. Cashman, .	filed
Nov.	27	Answer of deft to complaint; c/m 11-27-64; appearance of David C. Acheson & Arnold T. Aikens.	filed
1967			
Jan	30	Pretrial Proceedings (1/24/67) Assistant Pretrial Examiner	
May	29	Hearing begun and respited until May 31, 1967 at 10:00 a.m. (Rep: Thomas Dourian)	Corcoran, J.

May	31	Hearing resumed and respited to June 1, 1967 at 1:45 P.M. Corcoran, J.
Jun	1	Hearing resumed and respited to June 2, 1967 at 1:45 P.M. Corcoran, J.
Jun	2	Hearing resumed; respited to June 5, 1967 at 12:00 noon. Corcoran, J.
June	5	Hearing resumed and concluded; case taken under advisement. Corcoran, J.
June	15	Memorandum, including findings of fact and conclusions of law, and order entering judgment for plaintiff against defendants in the sum of $6,145.61 (N) (signed 6-13-67) Corcoran, J.
Aug.	11	Notice of appeal by USA; copies mailed to Bulman and Mullaney, Jr. filed
Aug.	14	Notice of appeal by deft, District of Columbia from order of 6/15/67; copies mailed to L. Z. Bulman and Arnold Aikens. filed
Oct.	17	Stipulation dismissing appeal [by USA] from judgment entered on June 13, 1967. (fiat) (N/371) Corcoran, J.

* * * * * * *

[Filed August 27, 1964]

COMPLAINT--NEGLIGENCE
(Personal Injuries on Public Playground)

1. The claim herein for relief on behalf of the plaintiff, Robert E. Jones, against the defendants, the United States of America, a sovereign corporation, pursuant to Section 1346(b) of Title 28 of the United States Code Annotated, known as the Federal Tort Claims Act;

the District of Columbia, a municipal corporation; and the Recreation Board for the District of Columbia, is for an amount in excess of $10,000.00 and is within the jurisdiction of this Court.

2. On or about July 23, 1964, and for a long time prior thereto, the defendants owned, operated, controlled and had the right of control over the public playground known as Sherwood Playground, located at 9th and G Streets, N. E., in the District of Columbia, the said defendants being duly charged with the duty and obligation to operate, supervise, inspect and maintain said playground and the equipment thereof and to operate and maintain said playground premises and equipment thereof in good and safe condition.

3. On or about July 23, 1964, about 6:45 P.M., the plaintiff, with other persons, lawfully entered the Sherwood Playground aforesaid, and, shortly thereafter, while the plaintiff was playing basketball on a basketball court provided in said playground, a basketball goal, consisting of a backboard and rim mounted on a heavy post, fell over onto the plaintiff, striking the plaintiff on and about the head, body and limbs, with resultant injury, damage and loss to the plaintiff as hereinafter set forth.

4. The falling of said basketball goal and the injuries, damages and losses sustained by plaintiff, resulted from the carelessness and

negligence of the defendants in failing and neglecting to maintain the said playground and its equipment, and particularly the said basketball goal, in a safe and proper condition; in negligently permitting said basketball goal to become unsafe and to remain in an unsafe condition for a long period of time; in failing to properly inspect said basketball goal; and in failing to correct the defective condition of the basketball goal although the defendants knew, or in the exercise of reasonable care should have known, of said defective condition; and in otherwise failing and neglecting to exercise reasonable care in the installation, supervision and maintenance of said basketball goal.

5. As a result of the carelessness and negligence of the defendants, as aforesaid, plaintiff sustained severe and permanent injuries to his person, including injuries to his head, body, limbs and nervous system and other injuries to his person; and he suffered and will suffer much physical pain, mental anguish and anxiety by reason of his said injuries, and he has incurred and will incur substantial expense for medical, hospital, x-ray, surgical and other treatment; and he has lost and will lose in the future much time from his employment with loss of earnings and his earning capacity has been impaired; and he was otherwise injured and damaged.

WHEREFORE plaintiff demands judgment against the defendants and each of them in the sum of One Hundred Thousand ($100,000.00) Dollars, besides interest and costs.

* * * * * * *

[Filed September 17, 1964]

ANSWER OF DEFENDANT DISTRICT OF COLUMBIA

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

1. This defendant admits that it is a municipal corporation, admits that the amount claimed by plaintiff exceeds, exclusive of interests and costs, the sum of $10,000 and makes no response to the conclusions of the pleader or the allegations pertaining to parties other than this defendant contained in paragraph numbered 1 of the complaint.

2. This defendant denies all allegations made against it contained in paragraph numbered 2 of the complaint.

3. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 3 of the complaint.

4 and 5. This defendant denies all allegations pertaining to it contained in paragraphs numbered 4 and 5 of the complaint.

Further answering the complaint, this defendant denies all allegations of negligence attributed to it and denies all allegations not specifically admitted or otherwise answered.

Third Defense

This defendant says that if plaintiff suffered injuries and damages as alleged, such injuries and damages were the result of plaintiff's sole or contributory negligence or the sole and concurring negligence of a party or parties other than this defendant.

Fourth Defense

This defendant says that the complaint describes the District of Columbia in a governmental function, the negligent performance of which it will not be held to respond in damages.

* * * * * * *

[Filed January 24, 1967]

PRE-TRIAL STATEMENT

Negligence action for personal injuries; against U. S. under Federal Tort Claims Act.

UNDISPUTED FACTS:

Defendant United States holds title to land at 9th and F Sts., N. E., in the District of Columbia, on which is located Sherwood Playground. The equipment thereon is maintained by the United States on a reimbursable basis. The playground staff is furnished by D District of Columbia. The United States only stipulates that P Robert E. Jones was struck by a falling basketball goalpost while playing basketball at the Sherwood Playground on July 22, 1964, at about 7:30 p.m.

Defendant District of Columbia stipulates that P was on said playground at said time and sustained injuries on playground.

PLAINTIFF ASSERTS that Sherwood Playground on July 22, 1964, and for a long time prior thereto, was operated by an agency of D District of Columbia and was under the maintenance of an agency of D United States of America; that the playground and its facilities are for the use of the general public and under the exclusive control of Ds;

That on July 22, 1964, P went to Shwrwood [sic] Playground for the purpose of playing basketball; that while P was playing basketball on one of the play areas designated for that game, the basketball goal (basket, backboard and pole) fell over on the plaintiff, injuring him. P contends that his injuries were caused by the following negligence of defendants:

Failure properly and safely to contruct the basketball goal and cement in the play area adjacent to the said pole

Failure properly to maintain the basketball goal in play area in a safe condition, in that the goalpost was insecure and the cement in the vicinity thereof was broken

Permitting basketball goal and play area to remain in said unsafe condition

Failure properly to inspect the basketball goal and play area to determine their unsafe and improper construction and maintenance

Allowing playing at the basketball goal and on the play area, Ds having actual or constructive notice of said unsafe conditions

Failure to provide proper supervision of the playground so that the basketball goal and play area would not become unsafe

Failure to take all necessary precautions and protections to avoid the basketball goal's falling on plaintiff

Plaintiff also relies on the doctrine of res ipsa loquitur.

PERSONAL INJURIES:

Lacerations of vertex of scalp

Cerebral concussion

Sprain of the left ankle

Sprain of the right ankle

Lumbosacral strain, with narrowing of L5 and S1

Contusion of the right chest

Frontal headaches

Hyperopis (visual difficulty)

Permanent: (Plaintiff was 22 years at time of incident.)

Chronic lumbosacral strain, with possible related vertebrae, disc nerve and muscle injury

SPECIAL DAMAGES:

Casualty Hospital	$ 1,515.61*
Dr. James Wilson Braden	630.00
Washington Hospital Center	6.50
Edmonds Optical (eyeglasses)	29.00
Dr. Stacey L. Rollins, Jr. Neurosurgical	35.00
Lumbo-sacral brace	30.00
Medicines (approx.)	50.00
	$ 2,296.11
Loss of earnings (GSI, 7/22/64 to 12/14/64)**	1,263.36
	$ 3,559.47

Also future medical expenses; and loss of earnings from 12/14/64 to date (to be supplied).

---

* D. C. has paid $1122.00 on this hospital bill, for which it has a lien.

DEFENDANT UNITED STATES asserts that the United States assigned land on which Sherwood Park Playground is located in its entirety to the Commissioners of the District of Columbia for its use. (P. L. 534, 77th Cong. April 29, 1942; 56 Stat. 261)

Defendant denies all allegations of negligence on its part, denies it had jurisdiction or control over the Sherwood Playground, and states that it was without notice, actual or constructive, of any defective or unsafe condition at the situs of the alleged accident.

Defendant United States denies it owed any duty to P to repair or maintain the playground, and asserts that maintenance is performed by the United States for the District of Columbia Recreation Department on a reimbursable basis.

Defendant United States further asserts that any injuries and damages which may have been sustained by P was caused by the sole or contributory negligence of plaintiff as follows:

Failing to heed warnings of others using the playground that the basketball goal was weak and shouldn't be used

Contributing to hazardous condition of goal by using it improperly

Failing to terminate play after he knew or should have known of the hazardous condition of the pole

Defendant United States further asserts that P assumed the risk of injury by using the basketball goal having knowledge that it was weak and in hazardous condition.

DEFENDANT DISTRICT OF COLUMBIA denies all allegations of negligence on its part.

D denies any duty to repair or maintain the instrumentality alleged by P to have caused his injury.

D asserts that if P was injured and damaged as alleged, such injuries and damages were the result of his sole or contributory negligence and/or assumption of risk, as stated by defendant United States.

D further contends that the complaint fails to state a claim against the District for which relief can be granted in that the District of Columbia is alleged to have been negligent in the exercise of a governmental function for the negligent performance of which it will not be held to respond in damages.

STIPULATIONS:

Facts under "UNDISPUTED FACTS".

It is stipulated the following may be admitted in evidence without formal proof of authenticity, subject to all other objections:

H. E. W. Mortality Table

Hospital records including x-ray plates (provided Ds be given access thereto prior to trial)

Plaintiff's PT Exhibits:

No. 1 and 2 and 3 - hospital bills
Records of D. C. Recreation Dept.
No. 4 - bill of Edmonds Opticions [sic]
DC's No. 1 and 2 - Health Dept. memos re payments at Casualty Hosp.
Any other bills or other documents initialled by all counsel prior to trial.

Counsel agree to exchange within one week copies of all medical reports to date not heretofore exchanged, if any, and to exchange promptly and prior to trial any additional medical reports which may be obtained.

Counsel for P agrees that Ds may have a medical examination of P by a physician of Ds' choice, provided it shall not interfere with trial date.

Counsel for D District of Columbia agrees to advise counsel for D United States states in writing within two weeks whether the District will stipulate that the United States has assigned the land in its entirety to the District of Columbia for its use.

Counsel for D United States agrees to make available at the trial the goalpost and base removed from Sherwood Playground, which are not or other documents in said D's possession.

NOTE: Counsel for P at pretrial requested that he be allowed to inspect and/or copy a report of Mr. David L. Moffitt, horticulturist (management) East Area, referred to in U. S. answers to Interrogatory No. 25b filed herein 3/25/65. Counsel for D United States objected thereto.

Counsel agreeing that the basketball goal post in issue was a metal post, the Examiner sustained the objection of United States.

Counsel for plaintiff, at pretrial, requested leave to inspect and/or copy all inspection reports of Sherwood Playground made by National Capital Region, National Park Service, for the period July 1, 1963 to July 22, 1964. Counsel for United States agreed to make such reports available to counsel for P is [sic] there are any such.

Counsel agree to exchange within two weeks the names and addresses of all witnesses known to them, including expert witnesses but exclusive of impeachment witnesses (filing a copy of said list with the Clerk of the Court), and if they learn of any additional witnesses prior to trial, they will advise the Clerk and opposing counsel the names and addresses promptly and prior to trial.

The Examiner has requested counsel to come to the trial with the maximum authority to settle the case which will be allowed them by their principals.

* * * * * * *

Monday, May 29, 1967

The above-entitled matter came on for trial before the HONORABLE HOWARD F. CORCORAN, United States District Judge, at 10:00 o'clock a.m.

APPEARANCES:

On behalf of the Plaintiff:

LEONARD Z. BULMAN, ESQ.

On behalf of the United States of America:

ARNOLD T. AIKENS, ESQ., and
LAWRENCE E. SHINNICK, ESQ.,
Assistant United States Attorneys

On behalf of the District of Columbia:

MATTHEW J. MULLANEY, ESQ.
Assistant Corporation Counsel

* * * * * * *

PROCEEDINGS

* * * * * * *

ROBERT EARL JONES

was called as a witness, and, having been first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BULMAN:

Q Would you state your full name loudly and clearly, sir?

A Robert Earl Jones.

* * * * * * *

Q And are you the plaintiff in this case?

A Yes, I am.

* * * * * * *

Q And where were you living in July of 1964?

A 612 12th Street, Northeast.

Q And what was your age at that time?

A 22.

* * * * * * *

Q Now, calling your attention to July 22, did you go to the Sherwood Playground?

A Yes, I did.

Q And where is that located?

A Between 10th and G Street -- between 9th and 10th, on G Street.

Q And is that northeast?

A Northeast, yes.

Q In the District of Columbia?

A Yes.

Q Now, what was the reason for going there?

A To play basketball and get exercise.

Q And about what time did you go?

A It was about 5:30, 6:00 o'clock.

* * * * * * *

Q And did you commence playing basketball?

A Yes.

* * * * * * *

Q Now, how many were playing in the game with you?

A Six, all together.

* * * * * * *

Q Now, what happened while you were playing?

A Well, as I was playing the game, one of my teammates shot the ball at the goal, and the ball came down in front of me. I went to pick it up; and, as I did, the goal fell on top of me.

* * * * * * *

Q All right. Now, prior to the goal post falling, was the game stopped for any reason?

A No, it was not.

Q Did you observe anything wrong with the goal post, sir?

A No.

Q Do you know what part of the goal post hit you?

* * * * * * *

A The rim of the backboard.

Q All right. Where did it hit you?

A The rim hit me at the top of the head; and the backboard, the upper and lower part of my back.

* * * * * * *

CROSS-EXAMINATION

BY MR. AIKENS:

* * * * * * *

Q Do you recall roughly about how many shots you took in that game when the pole fell down?

A It was not many. It was just a few.

Q Now, during the time that you were taking practice shots, had you noticed anything wrong with that pole?

A No, I had not.

* * * * * * *

Q Did anyone during the game make any comment that it appeared as though something was wrong with the backboard or the pole?

A No, not to my knowledge. I didn't hear anybody saying anything about something was wrong with the goal.

* * * * * * *

Q At any time during that game did any of the people standing on the sidelines shout to you or the other players in the game and say that something was wrong with the basketball pole?

A No, not to me.

Q They never did?

A No.

Q At any time during that game, Mr. Jones, did you players stop the game and go over and inspect that pole and that backboard?

A No, I didn't.

Q Did anyone else playing with you do it?

A No.

Q Either during the first game, was this done?

A No, it was not.

* * * * * * *

MARTIN KENNETH WASHINGTON

was called as a witness, and, having been first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BULMAN:

Q Would you please state your full name?

A Martin Kenneth Washington.

Q And where do you live, Mr. Washington?

A 719 T Street, Northeast.

* * * * * * *

Q How far is your home from the Sherwood Playground?

A A block.

Q And where is the Sherwood Playground.

A Ninth Street

* * * * * * *

Q Now, do you ever play over at Sherwood Playground?

A Most of the time.

Q All right. In the summer of 1964, specifically in July, how often would play [sic] at Sherwood Playground?

A Oh, I used to play there most of the time.

Q By "most of the time," do you mean every night?

A Not every night.

Q Almost every night?

A Yes, almost

* * * * * * *

Q All right. And were you present the night that a basketball goal fell?

A Yes.

Q And what happened?

* * * * * * *

A Well, a couple of fellows shot the ball and a couple of fellows went up and the pole fell.

Q And did it hit anyone?

A It hit Jones.

Q By "Jones," is that Mr. Robert Jones here?

A Yes, that is the one there.

* * * * * * *

Q All right. Now, prior to July 22, 1964, did you then observe anything about this particular goal post?

A Yes.

Q What did you observe?

A The cement around it was broken, around the post.

* * * * * * *

Q Mr. Washington, I am going to show you Plaintiff's Exhibits No. 2 and 3 and ask you to identify them as to the fact -- you will have to imagine that the pole is standing. But I ask you to identify those. Can you identify what is pictured in the two pictures?

A Identify it how?

Q Is that what the ground looked like around the goal post?

A Yes.

Q This is before it fell?

A Yes.

MR. MULLANEY: Your Honor?

THE COURT: What is it, Mr. Mullaney?

MR. MULLANEY: I wonder if I can see the photographs, Your Honor.

THE COURT: Certainly.

MR. BULMAN: Oh, sure.

Your Honor, I would like to offer Plaintiff's Exhibits No. 2 and 3 into evidence.

THE COURT: Is there objection?

MR. MULLANEY: I have no objection.

MR. AIKENS: No objection.

THE COURT: There being no objection, they will be received.

THE DEPUTY CLERK: Plaintiff's Exhibits 2 and 3 in evidence.

(Plaintiff's Exhibits No. 2 and 3, previously marked for identification, were received in evidence.)

MR. AIKENS: With the condition, Your Honor, that counsel states when the pictures were taken.

MR. BULMAN: July 30th.

MR. MULLANEY: What year?

MR. BULMAN: 1964.

THE COURT: That is about a week after the accident?

MR. BULMAN: Yes.

* * * * * * *

BY MR. BULMAN:

Q Now, Mr. Washington, how long prior to July 22nd, 1964, did you observe that this cement had been broken, what period of time?

A Well, I don't have no definite period of time.

Q Well, was it as much as a week, or was it as much as a month, or more than a month?

A I could not possibly say. I know it had been a length of time.

Q It was a length of time?

A Yes, but I couldn't tell you.

Q Now, other than the broken cement, did you notice anything else about the pole?

A No.

* * * * * *

CROSS-EXAMINATION

BY MR. AIKENS:

* * * * * * *

Q Now, you said sometime before July 22nd, you had observed some cracks in the cement?

A Yes.

Q I want you to tell me: What do you mean by a crack in the cement? Assume we are looking down at a hole. Were these cracks running out from the hole? What do you mean by cracks in the cement?

A Well, the cracks circled around the pole, the cement.

Q You mean the circle right around the base of the pole was cracked?

A Yes. Well, it had some cement around it.

* * * * * * *

Q I want to know what you observed about that hole where the pole went into the ground. Now, what do you mean by cracks in the cement?

A Well, it just was broke out. It looked like it was broke out from around the pole, itself.

Q You mean the edge of the concrete was broken?

A Yes.

Q It was chipped or broken off?

A Well, it was broke.

Q How much of it was broken off?

A Well, I didn't measure it, but --

Q A little bit?

A A little bit, about half an inch, something like that.

Q Half an inch?

A Yes, sir.

* * * * * * *

Q How far?

A It was a good little bit, so that you could see the sleeve or the bolt, or whatever was holding that pole in the ground.

Q All right. How far back was that concrete from the pole?

A I could not tell you how far back. It was a good little bit.

Q A quarter of an inch?

A I still could not say.

Q Half an inch?

* * * * * * *

Q You cannot estimate how far that concrete was from that post?

A About a good three-quarters of an inch.

Q How far could you see down below the surface level?

A You could see past the bar, the little bar; you could see past the little bar.

Q What do you mean by a bar?

A It was holding the pole. And you could see down past it, on some sides of it, now; not on all the sides, but some sides.

Q And you could see a bar?

A Yes.

Q What was the bar doing?

A I guess it was a brace for the pole, itself.

Q What did this bar look like?

A Like a bolt.

Q Like a bolt?

A Yes.

Q And where was the bolt?

A It was in the pole, itself.

Q You mean through the pole?

A Through it, all the way through one side to the other.

Q What direction was this bolt going through the pole?

A Oh, straight through, between the -- between the --

Q Was it parallel to the backboard?

A Yes.

Q Is it running in the same direction as the backboard?

A The backboard, yes.

Q How far below the surface of the ground was that bar or bolt?

A About an inch.

Q Pardon?

A About an inch, I think. I am assuming it was about an inch.

* * * * * * *

Q Was that the condition that you saw prior to July 22nd?

A I still could not give a positive answer whether it was or not. I could not do that. I cannot definitely say that it was prior to the accident. I could not definitely say, because it was a pretty big hole, anyhow.

Q Well, how big was it? This is what we are trying to find out, Mr. Washington.

A Well, I still could not say.

Q Did you see this pole after it fell?

A Did I see it after?

Q Yes.

A Yes.

Q Did you go up and look in the place in the ground where this pole had broken off?

A Yes.

* * * * * * *

Q How many days prior to the time this pole fell did you see this condition with respect to the cement?

A It had been a length of time.

Q What is a length of time, Mr. Washington?

A Oh. about a month or so.

Q It was about a month?

A Yes.

Q Had you played basketball on that court?

A Yes.

Q In that prior month?

A Yes.

Q Had you played at that pole?

A I could not quite remember offhand, but possibly I played at that pole.

Q Were you standing there when the pole fell, Mr. Washington?

A Yes.

* * * * * * *

Q You had not noticed anything wrong with the pole before that time?

A Yes.

Q What had you noticed?

A Well, it shook when the ball was shot; it shook a little bit.

Q You mean the pole vibrated?

A Yes, it vibrated.

* * * * * * *

Q You looked down at that place where that pole fell off, and you were aware that that pole was in some kind of cup or sleeve, were you not?

A Yes.

Q And, upon seeing that, were you aware that that was what was holding this pole?

A Yes.

Q And that concrete that you saw chipped, that was nothing more than the surface of the court, was it not?

A Possibly, yes.

* * * * * * *

JAMES WILBUR THORNE

was called as a witness, and, having been first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BULMAN:

Q. Please state your full name.

A James Wilbur Thorne.

* * * * * * *

Q And where are you employed, Mr. Thorne?

A National Park Service.

Q And how long have you been so employed?

A 21 years.

* * * * * * *

Q And what is your position there?

A Assistant chief of maintenance.

Q And how long have you been in that position?

A Since 1953.

Q And, as part of your job, is it taking care of the maintenance of certain public playgrounds in the District of Columbia?

A Supervision of it, yes, sir.

Q And one of the playgrounds that is maintained by your department, under your supervision, is the Sherwood Playground?

A At that time.

* * * * * * *

Q And you are familiar with the situation in which a basketball goal fell on July 22, 1964?

A Yes, I am.

Q Did you investigate the situation?

A The next day.

Q And that would have been July 23rd?

A I guess so.

Q And what did your investigation consist of?

A We went and talked to the playground director to try and find out what happened.

* * * * * * *

Q Now, in your capacity with respect to the maintenance of the playgrounds, how often did you inspect the playgrounds?

A I had 40 playgrounds at that time. I was in charge of 40 playgrounds, plus all of the parks in that area.

Q All right. Now, what you are saying is that one of the men under you would actually do the inspection; is that what you mean?

A That is true.

Q About how often would the playground be inspected by you, or someone under you?

A Once a week.

Q Once a week?

A Yes.

Q What would this inspection consist of?

A Everything that is on the playground; a check for safety, for hazards, or anything that needs repair.

Q Did you ever find any disrepair of the goal post which ultimately fell?

A No, I did not.

* * * * * * *

Q Now, was the goal post erected under your supervision?

A No, it was not.

Q Is Mr. Louis Henderson -- was he under your supervision at that time?

A Yes, he was.

Q And if he erected the post, would he have been under your supervision?

A If he erected it, he would have been, yes.

* * * * * * *

Q * * *

In 1958, was Mr. Henderson under your supervision?

A Yes, he was.

Q Is the erection of goal posts under your department?

A Not necessarily. It is under my department, but he would do it on his own without me knowing anything about it.

Q Now, I will ask you: Do you know what materials were the component parts of the basketball goal?

A I know what one consisted of, yes, sir.

Q All right. What is that?

A Three-inch pipe, 16 feet long.

Q And how is it erected?

A It is holed out approximately two feet square, three feet deep. They place it three feet into the ground with approximately one-quarter of a yard of concrete around it.

Q Is anything else placed in the ground?

A No, that is all we place in them now.

Q Do you know if this goal post was erected in that manner?

A No, this one was not.

Q How was this one erected?

A This one was in a sleeve.

Q Why was this one is a sleeve?

A I have no idea.

Q And what else was done to this goal post that was unusual?

A Unusual?

Q Was there a hole drilled in this goal post?

A It shows one.

Q Is this usual?

A I have no idea. I have never placed one in a sleeve.

Q Do you know about how much this goal post weighs, the whole goal post?

A No, I do not. I would not guarantee a guess.

Q At least 175 pounds?

A The post, itself?

Q The whole set-up, the goal post with the backboard and rim?

A Oh, yes, it probably would.

Q More than 175 pounds?

A At least 175 pounds.

Q Do you have any records of any repairs being done to this basketball goal post?

A No, I do not.

Q Do you have any records of when the hole was drilled?

A No, I do not.

Q Did you say the post was 16 feet long?

A Yes.

Q How much of it was in cement?

A Three feet.

* * * * * * *

CROSS-EXAMINATION

BY MR. AIKENS:

Q Mr. Thorne, would you tell us how many men you have under your supervision that maintain the playgrounds?

A For the playgrounds, themselves, there is a maintenance crew of three men.

Q Now, would you tell us something about how these men operate with respect to inspecting and making repairs on the various playgrounds?

A They have a routine route; they go once a week and check all the playgrounds and all the equipment. And if there is a minor repair, they take care of it immediately. And I would not know anything about it.

Q And if it is something more than a minor repair?

A They notify the playground director, and they submit a work order.

Q And what happens then?

A And then we do the work.

Q Now, if a basketball pole needed repair, would that be made by the man right on the spot who makes the inspection?

A Yes, it would.

* * * * * * *

REDIRECT EXAMINATION

BY MR. BULMAN:

* * * * * * *

Q At any time within a year is there a more detailed inspection of each playground?

A Well, I don't know about more detailed. It is practically inspected every day by someone.

Q Does your department have any personnel at the playground every day?

A My department has a custodian there every day, eight hours a day.

Q And is it part of his job to look around for things?

A That is correct.

* * * * * * *

BARRY IRA HYMAN

was called as a witness, and, having been first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BULMAN:

Q Would you please state your full name?

A Barry Ira Hyman.

Q All right. And what is your home address, Dr. Hyman?

A 1919 North Daniel Street, in Arlington.

Q And where are you employed?

A George Washington University, Engineering School. I am on the faculty.

* * * * * * *

Q What rank do you have? Are you a full professor?

A Assistant professor.

Q And that is in the engineering department?

A Engineering School.

* * * * * * *

Q And what do you teach, sir?

A Courses in structural engineering, structural mechanics.

* * * * * * *

Q And do you have a Ph.D.?

A Yes.

Q And where did you get that?

A At VPI.

Q And have you been actively teaching structural engineering courses since you received your degree?

A Yes.

Q And how long have you been teaching at GW?

A Three years.

Q And do you have any experience in the structural engineering field?

A Yes.

* * * * * * *

Q And are you a member of any societies or associations?

A Yes. I am a member of the Graduate Society of Mechanical Engineers, the American Institute of Aeronautics and Astronautics, the American Society of Engineering Education, several honorary societies.

* * * * * * *

THE COURT: * * * I think he has a general expert background. I am going to let him qualify as an expert and see what he has to say as to the particular subject.

* * * * * * *

BY MR. BULMAN:

Q Now, Dr. Hyman, did you, on or about April 11, 1966, conduct an investigation at my request with respect to the failure of a basketball goal post?

A Yes.

* * * * * * *

Q And what was the purpose of your investigation?

A To investigate this goal post that had fallen over.

Q And did you conduct this investigation with the intent of determining what the cause of the failure was?

A Yes.

Q And of what did your investigation consist?

A Essentially, I looked at the part in question, took some measurements and made a couple of sketches and jotted down what I thought were pertinent observations.

* * * * * * *

When I inspected the post, it had already broken. If you look in at this view, AA, you have the pipe, the goal post. I measured the inner diameter, 2-7/16ths inches; and the outside diameter, 3.5 inches.

And then there was a hole right at the section where failure occurred. There was a hole drilled through the pipe, a half-inch-diameter hole.

* * * * * * *

Q Now, did you make an observation of both the goal post with the post attached and the bottom part that it had broken away from?

A Yes. * * *

* * * * * * *

Q All right. Now, Dr. Hyman, I am going to give you this, which has been identified and stipulated as being the cut-off portion of the post.

I will ask you, if you would, to point out to His Honor any factors which would show you as to how this post was caused to fall, in your opinion.

A Well, the thing that caught my attention first at the very beginning was the hole drilled right through the section of failure, which I would consider to be of very poor design, and the fact that the holes were considerably deformed completely around their edges, which indicated that the bolt that had been inserted in the hole was working its way -- was not secure and was working its way around the edges of the hole, providing a detrimental effect.

Q All right. As a result of your investigation and the inspection, did you make an opinion as to what caused the failure?

A Well, this failure was caused more, I would say, by repeated application of loads, which, if applied just once, would not cause the part to fail. I would call this a fatigue failure; that is, the same load, a given load applied once would not cause the failure, but applied many, many times, might cause failure.

* * * * * * *

Q And what effect does stress have in fatigue fracture?

A Well, in any failure it is the level of the stress as compared to the capability of the material to withstand stress that determines whether it will fail or not.

Q Now, is this a progressive thing, or does it occur suddenly?

A Well, I would say microscopically it is progressive. But, to the eye, you would not necessarily be able to determine any indication of failure being about to occur.

Q All right. Now, did you determine at what point on the goal post was the maximum stress?

A Yes.

* * * * * * *

Q And did you observe as to whether the hole which was drilled affected this stress?

A Very much so.

* * * * * * *

Q So it is your opinion that the hole decreased the maximum stress that this pole could take?

A Yes.

* * * * * * *

Q Was there any evidence on your investigation that the post was loose prior to its falling?

A Well, the pictures indicated that some concrete or whatever the material was surrounding the post, had deteriorated. But this was not really relevant to an analysis of the failure.

The failure occurred in the pipe; and whether or not the concrete was intact or not was irrelevant.

Q Now, as an expert structural engineer, Dr. Hyman, what should have been done, or not done, to make this a secure pole for the purpose for which it was to be used?

A They should never have drilled that hole.

* * * * * * *

FLEMMING BERNARD GREGORY

was called as a witness, and, having been first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BULMAN:

Q Would you state your full name, please?

A My name is Flemming Bernard Gregory.

* * * * * * *

Q And where are you employed?

A I am employed at the D. C. Recreation Department.

* * * * * * *

Q And in July of 1964, more specifically July 22, 1964, were you employed by the Recreation Department?

A Yes, I was.

Q In what capacity?

A I was employed as the Supervisor and Recreation Specialist at the Sherwood Recreation Center, Region F.

Q Would that mean that you were in charge of Sherwood Playground?

A That is correct.

Q Were you working on July 22, 1964?

A Yes, I was.

Q Were you working when the occurrence about which we are here in Court today concerning the falling of a basketball goal on that evening, were you working at that time?

A No, I was not.

* * * * * * *

Q Now, in the course of your being in charge of the playground, did you inspect the play area?

A Yes, I did.

Q How often?

A Every morning when it was my tour of duty from the A. M. until the early P. M.

Q And what would that investigation consist of, sir?

A It would consist of a total check of the facilities used by participants during their engagement in the recreation program.

Q Would this be merely a sight check or would it be a touch check as well?

A It would normally be a sight and/or touch check, depending upon what the situation was regarding what facilities were involved.

Q All right. Now, on this particular day did you inspect the play area involved in this case; in other words, the basketball court which fell -- the basketball goal which fell, excuse me?

A Yes, I did.

Q Had you any previous complaints about this particular basketball goal?

A No, I had not.

* * * * * * *

Q If there had been anything wrong with the basketball court or the basketball goal post, do you think you would have observed it?

A I am pretty sure I would have observed it.

Q How much experience do you have in playgrounds?

A Approximately 15 years.

* * * * * * *

Q Did you ever play on that basketball court yourself?

A Yes, I have.

Q And do you recall when was the last time prior to July 22nd that you played?

A The 21st.

* * * * * * *

Q Now, during the time that you were at Sherwood Playground and prior to July of 1964, were there ever any repairs done to this particular goal post, to your knowledge?

A None, not to my knowledge.

* * * * * * *

Q I am going to ask you to identify what has been marked as Plaintiff's Exhibit No. 4.

A Identify comments?

Q Well, first identify what it is.

A This is an RD-15, or attendance report, District of Columbia Recreation Department, for Sherwood Recreation Center, Region F, for the month of March, 1964.

Q All right. Now, there is a column marked "Comments". Who wrote those comments down?

A I did.

Q And would you read it, please?

A It says: "Comments (Include program evaluation staff on leave, accidents, maintenance problems, inspection notices, and so forth): Changing peak time from 4:00 to 5:30 p.m., 17 March 1964. Donations for major portion of Easter program 27 March 1964. Total, some 151 Fridays. Flower garden project approved 26 March 1964; NCP survey for improvement 30 March 1964."

* * * * * * *

Q Now, I am going to hand you Plaintiff's Exhibit No. 5, and if you will just identify it and then just read the last line of the comments, which is the only thing applicable.

A Plaintiff's Exhibit No. 5 is also an attendance report of the D. C. Recreation Department. Under "Comments" it says: "In-

creasing female participation; greatest percentage between 4:30 and 7:30" --

Q Just read this last line.

A "Facility improvement not begun as of yet."

Q All right. And I will ask you to identify Plaintiff's Exhibit No. 6.

A No. 6 is also an attendance sheet, D. C. Recreation Department, and this states: "Play area in very bad condition; work not begun; safety conditions worsen with every rain. Accident 22 July: follow-up turned in, information received. Accident No. 222, July time, 8:20 p.m., RD 12 on file. Sherwood Regional Sectional Representative for East, mine."

* * * * * * *

CROSS-EXAMINATION

BY MR. MULLANEY:

* * * * * * *

Q Mr. Gregory, would you describe the condition of the surface of the playing area right around the pole, immediately before and after the accident?

A Well, the area around the pole there, there are concrete slabs throughout the whole basketball area.

Around the pole, I noticed nothing of any nature that would indicate that there was some defect or any default in the pole. The concrete there came up to the pole area.

* * * * * * *

CROSS-EXAMINATION

BY MR. AIKENS:

* * * * * * *

Q In your 15 years in the D. C. Recreation Department, you have served at many of the playgrounds?

A That is correct.

Q Do all of those playgrounds have a basketball court?

A All of them have a court, yes.

Q At least one court, and some more?

A Right.

Q Have you ever known of a basketball pole to fall down at any of those courts in those 15 years?

A Not before this one.

* * * * * * *

Q Tell me, Mr. Gregory, how the concrete is located around the basketball pole; how close was it to the basketball pole?

A The concrete there was up to the area of the pole.

Q It runs right up to the pole?

A Right.

* * * * * * *

Wednesday, May 31, 1967

* * * * * * *

VINCENT WASHINGTON

called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AIKENS:

Q Will you state your name and address, please?

A Vincent Washington, 719 G Street, Northeast, Washington, D. C.

Q How old are you, Mr. Washington?

A Twenty-eight.

Q And what is your education?

A I am a biology major.

Q You are a what?

A Biology major.

Q In college?

A Yes, sir.

Q How many years of college have you had?

A Two years.

Q Where was that?

A Northwestern University in Chicago, Illinois.

* * * * * * *

Q Do you live in the vicinity of Sherwood Playground, Mr. Washington?

A Yes, sir.

Q Now, I direct your attention to the evening of July 22, 1964. Did you have occasion to go to Sherwood Playground that evening?

A Yes, sir.

Q About what time did you go there?

A About 6:30.

Q That was 6:30 in the evening?

A Yes, sir.

Q What was your purpose in going there?

A To play basketball.

Q Was there a basketball game in progress when you got there?

A There was one just beginning to end when I got there.

* * * * * * *

Q Did anything unusual happen in the course of that game?

A Yes, sir.

Q What was that?

A The basket was loose.

* * * * * * *

Q Did anything happen to the basket?

A Yes, it shook a little during the time the ball was being shot.

Q Did anything happen to the pole in the course of that game?

A Yes, sir.

Q What was that?

A The pole rattled.

Q At what point in the game did you observe this?

A It was about five or ten minutes later on in the game.

Q From the time the game started until you observed the pole shake and the other things that you have described, how much time passed?

A About 15 minutes.

Q Now, what if anything did you do about this?

A Well, we stopped the game and we looked to check to see what was rattling in the basket.

Q And what did you find when you checked this?

A That the cement around the basket had been chipped away.

Q Now, when you say "chipped away", what do you mean by that?

A Well, it must have been broken or as though somebody had been digging in it.

* * * * * * *

Q Where was the concrete chipped that you spoke of?

A It was chipped around the pole.

Q At the base of the pole?

A Yes, sir.

Q And what kind of chip marks were there?

A There was little chip marks and there was a split in between the cement and the pole, I would say about three inches long.

Q By "a split," do you mean a crack in the cement?

A Yes, sir.

* * * * * * *

Q How many of the players went up to inspect this pole?

A Well, it was quite a few of the players went and also those on the sideline.

Q And as a result of this inspection and the examination of the concrete that you made, what then did you and the other players do?

A Well, after we examined to see what was the shaking in the basket, we decided to resume playing because we figured it wasn't anything serious.

Q Then after that, after resuming play, Mr. Washington, what happened.

A Well, then the basket began to turn over and fell.

Q How long after you had resumed play was it that the basket fell?

A Anywhere between 10 and 15 minutes.

* * * * * * *

Thursday, June 1, 1967

* * * * * * *

MELVIN R. MYERSON

called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHINNICK:

Q Doctor, would you tell us your name, please?

A Melvin R. Myerson.

* * * * * * *

Q Would you tell us your occupation and profession?

A I am a metallurgist at the National Bureau of Standards, Chief of the Engineering Metallurgical Section.

Q How long have you been so employed, sir?

A For 21 years.

Q What is the nature of your duties and responsibilities as Chief of the Metallurgical Section?

A We perform metallurgical research and we also investigate service failures and other minor problems for any Government agency that may request it.

* * * * * * *

Q * * *

When and where did you obtain your advanced degrees?

A At the University of Maryland in 1953 and I received my Master's Degree and Doctor's Degree in 1962, both in Metallurgy, both at the University of Maryland.

* * * * * * *

Q Have you had any experience in the field of teaching metallurgy or metallurgical engineering?

A Yes. I have taught part time at the University of Maryland for three years, at the George Washington University for one year, and in military engineering for 15 years at Fort Myer.

* * * * * * *

Q Have you had occasion to prepare reports for Government agencies concerning metal failures and metal fatigue?

A Metal failures, including metal fatigue, yes.

* * * * * * *

Q * * *

Are you a member of any societies or associations of persons engaged in work and study in the field of metallurgy and metallurgical engineering?

A Yes, three: The American Society for Metals; the American Institute for Mining and Metallurgical Engineers; and the American Society for Testing and Materials.

Q I ask you, sir, if you have held offices in any of these societies and, if so, which?

A I was chairman of the Washington chapter of the American Society for Metals; and I am on national committees of the American Society for Metals and the American Society for Testing and Materials.

Q I would ask if you have been licensed as a registered professional engineer?

A Yes, I am a licensed professional metallurgical engineer in the District of Columbia.

* * * * * * *

THE COURT: * * * I will accept him as an expert.

* * * * * * *

BY MR. SHINNICK:

Q Dr. Myerson, I had asked you if you had been requested by Mr. Aikens of the United States Attorney's Office to conduct an investigation with respect to the failure of a pipe which had been used to support a basketball backboard?

A Yes.

Q Doctor, I would ask you if you have been given this section of the pipe by Mr. Aikens to be tested by you in your laboratory (exhibiting portion of pipe)?

A Yes, sir.

Q Do you have the pertinent measurements there concerning that pipe?

A Yes.

Q Would you tell us what those measurement are?

* * * * * * *

A The pipe was 16 feet long. There was 10 feet from the ground to the bottom of the backboard. There were three feet under ground. The inside diameter of the pipe was 2-1/2 inches. The wall

thickness of the pipe was 5/16 inches. The backboard was about 54 inches wide by 32 inches high, but it was irregularly shaped. It was not a regular shape at all.

Q All right. Do you have the outside diameter of the pipe, sir?

A About 3-1/8 inches.

Q Doctor, do you have the dimension of the hole that has been drilled through that pipe?

A It is about a 5/8 inch hole.

* * * * * * *

Q Were all the tests and investigations of this pipe conducted at the Bureau of Standards?

A These were done in my laboratory and I was present and working with Mr. Bennett who works for me. We both worked together on this particular project.

Q The tests, then, were conducted under your supervision?

A Yes, sir.

Q Now, what was the purpose of your investigation?

A To determined the nature of the failure, that is, whether it was a tensile failure, a fatigue failure, an impact failure, or just what kind it was.

We noted that the two holes that had been drilled for the pin had been battered all around. They are deformed.

And then, we noticed that, apparently, the fracture was a fatigue fracture that had proceeded from each hole in all four directions -- and by all four directions, I mean this way, this way, this way and this way -- gradually working around until the only metal left intact was a piece here and a piece here (indicating); and then that being too little metal to support the entire pole, it fell over. It tore in tension here and here (indicating).

So, the fracture started as a fatigue fracture and it worked its way around to these two points and then when there was too little metal to support the pole, it toppled over.

Q What kind of a fracture did you say that was?

A A fatigue fracture.

* * * * * * *

CROSS-EXAMINATION

BY MR. BULMAN:

* * * * * * *

Q Now, Doctor, in your expert opinion did the drilling of that hole contribute to the fatigue fracture?

A The drilling of the hole, no.

Q The presence of the hole.

A The presence of the hole did contribute to the fatigue fracture since it started at the hole, yes.

* * * * * * *

FURTHER REDIRECT EXAMINATION

BY MR. SHINNICK:

* * * * * * *

Q Mr. Bulman has asked you, Doctor, assuming the hole was not there, would there have been a fatigue fracture under normal use? You said, no. Is that a correct interpretation?

A In my opinion, I don't think there would have been.

* * * * * * *

Q Is it possible for you to say, Doctor, with reasonable metallurgical certainty that if there were not a hole in that pole that the pole would not have fallen in fatigue fracture given that somebody, at various times, was on top of the pole, swinging back and forth in various directions?

A I have to base my answer on the fact that 80 or 90 per cent of all fatigue failures start at some notch or hole and so on, and if these are absent, there is a much greater chance that they will not start. So, based on that, I say that I would be surprised if this were a perfectly

smooth pipe that this kind of a fracture would have started. Fatigue is so influenced by surface conditions, conditions of indentations, of holes and so on, as was read, that this has to be a material part of it.

* * * * * * *

ROBERT E. JONES vs USA and District of Col } 2116-66

32-41 (Rev.)

Take count at peak time.
Record actual count at that time.

DISTRICT OF COLUMBIA RECREATION DEPARTMENT
ATTENDANCE REPORT

Unit and Region: [illegible] 'F'
Month and Year: [illegible] 1964

VISITS	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Totals
Morning		26	23	27	26	26	30		23	25	26	23	24	92		24	25	28	26	27	18		26	27	27	41	36	97		52	31	1212
Afternoon		141	26	38	158	165			73	146	114	71	116			141	261	131	97	152			189	244	215	185	246			34	56	3070
Evening																																
Permit																																

SERVICES

A. To community by staff. (Staff attendance at community meetings, counseling, etc.)

Name	Type of Service	No. Hrs.	Attendance
Mrs. [illegible] / Mr. [illegible]	[illegible] Club	2	22
Mr. [illegible]	[illegible]	1	3

B. Administrative. (Staff time spent off unit for training, committee work and staff meetings.)

Name	Type of Service	No. Hrs.
Mr. B. [illegible]	Staff Meeting	3
Mr. [illegible]	[illegible]	7
Mrs. [illegible] / Mr. [illegible]	[illegible]	2
Mrs. [illegible]	Library [illegible]	4
Mrs. [illegible]	[illegible]	7
Mrs. [illegible] / Mr. [illegible]	Staff Meeting	5

C. Volunteer. (Citizens who aid program by donating time, skills, etc.)

Name	Address	No. Hrs.
Mrs. [illegible]	1151 [illegible]	45
		8

FILED
SEP 6 1967
ROBERT M. STEARNS, Clerk

COMMENTS. Include program evaluation, staff on leave, accidents, maintenance problems, inspection notes, etc.

Change in peak time: from 4 to 5:30 PM 17 March 64
[illegible] for [illegible] of [illegible] 29 March 64. [illegible] 151 prizes
[illegible] [illegible] 26 March 64
[illegible] for improvements 30 March 64

Recorded by [illegible]
Checked by

PLAINTIFF'S EXHIBIT

FOR OFFICE USE ONLY			
A. Hours	A. Attendance	B. Hours	G.T. Visits
3	25	26	7635

BEST COPY AVAILABLE
from the original bound volume

ROBERT E. AGNES vs USA AND District of Col. } 2116-64

13-13 (Rev.)

Take count at peak time.
Record actual count at that time.

DISTRICT OF COLUMBIA RECREATION DEPARTMENT
ATTENDANCE REPORT

Unit and Region: [illegible] 5
Month and Year: May 1964

VISITS	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Totals
Morning 11	23	161		24	35	23	25	24	97		31	24	23	24	30	119							96						116	C		863
Afternoon 6	116			137	189	216	219	196			210	186	216	201	198			187	109	216	258	186			246	163	74	187	96	[illegible]		3904
Evening 7	137			163	97	194	169	99			165	197	36	152	87			115	96	187	142	94			216	189	97	95		[illegible]		2751
Permit																														D		

SERVICES

A. To community by staff. (Staff attendance at community meetings, counseling, etc.)

Name	Type of Service	No. Hrs.	Attendance
F. Gregory	Comm. Rec. Programming	4	137

B. Administrative. (Staff time spent off unit for training, committee work and staff meetings.)

Name	Type of Service	No. Hrs.
Gregory, Royster	Stage Magazine	3
Gregory	Bench Cycles	2
Royster	May Day Fest.	4
Gregory, Royster	Stage Meeting	3
Royster	Pet Show	4
Gregory, Chandler	Track (Rain)	4
Chandler	League Play	3

C. Volunteer. (Citizens who aid program by donating time, skills, etc.)

Name	Address	No. Hrs.
Mr. S. Shickley	1003 F St. NE	34
Mr. H. Maxwell	706 10th St. NE	16

F I L E D
SEP 11 1967
ROBERT M. STEARNS, Clerk

[61]

COMMENTS Include program evaluation, staff on leave, accidents, maintenance problems, inspection notes, etc.

Increase in Permit Participation — Commit % between 4 PM and 7 PM
Unit participation — 13-14 yrs. Walter Johnson Opener (Rainbow) 19 May 64
Daytime operation — 29 May 64 10:30 AM to 6 PM. Staff 2 males; Fisher on leave 28 May 64 thru Monday 1 June
Twenty days this job filled — Faye Nash (4 hrs Saturday) 644 95 NE
Facility improvement not begun as of yet.

Recorded by: F. B. Gregory
Checked by: [illegible]

FOR OFFICE USE ONLY			
A. Hours	A. Attendance	B. Hours	O.T. Visits
4	137	23	5617

PLAINTIFF'S EXHIBIT 85

ROBERT E JONES VS
USA AND
District of Columbia

2116-64

F3-15 (Rev.)

Take count at peak time.
Record actual count at that time.

DISTRICT OF COLUMBIA RECREATION DEPARTMENT
ATTENDANCE REPORT

Unit and Region: Sherwood F
Month and Year: July 64

VISITS	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Morning	189	196	53	C		181	180	39	234	210	86		236	192	194	234
Afternoon	153	210	91	[illegible]	206	114	196	68	189	386	96	65	186	259	116	289
Evening	93	573		[illegible]		83	91	140	109	117			116	179	127	110
Permit												58				

VISITS	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Totals
Morning	226	96		265	287	295	149	142	118		246	215	241	193	180	4577
Afternoon	193	155	167	214	196	246	93	100	87	109	235	265	200	89	123	5272
Evening	97			87	98	310	98	76			81	98	87	60	76	2556
Permit																157

SERVICES

A. To community by staff. (Staff attendance at community meetings, counseling, etc.)

Name	Type of Service	No. Hrs.	Attendance
	FILED SEP 6 1967 ROBERT M. STEARNS, Clerk	\	

B. Administrative. (Staff time spent off unit for training, committee work and staff meetings.)

Name	Type of Service	No. Hrs.
Rysstree	Staff Meeting	2
Cheavy	Staff Meeting	2
Cheavy	Walter Johnson	15

C. Volunteer. (Citizens who aid program by donating time, skills, etc.)

Name	Address	No. Hrs.
Steven Kirkby	1003 E St NE	87

8

COMMENTS Include program evaluation, staff on leave, accidents, maintenance problems, inspection notes, etc.

Play area is very bad condition. Work not begun. Stormy conditions worsen area every rain.
Accident 22 July — follow up [illegible] information received.
Accident 2 — 22 July — time 8:20 AM. RO 2-00 FHS.
Sherwood Running [illegible] Representative for [illegible] (Union)

Recorded by: [illegible signature]
Checked by: [illegible signature]

PLAINTIFF'S EXHIBIT

FOR OFFICE USE ONLY			
A. Hours	A. Attendance	B. Hours	O.T. Visits
			13,715

* * * * * * *

[Filed June 15, 1967]

MEMORANDUM AND ORDER

This is an action against (1) the United States of America under the Federal Tort Claims Act (28 U. S. C. § 1346(b)) and (2) the District of Columbia.

The plaintiff Robert E. Jones seeks damages for personal injuries sustained on July 23, 1964 at the Sherwood Playground located at 9th and G Streets, N. E. in the District of Columbia.

FINDINGS OF FACT

It was stipulated and the Court finds that the Sherwood Playground is operated by the District of Columbia Recreation Board, but that the maintenance of the playground is the responsibility of the National Park Service of the United States Government.

The injuries of which Jones complains occurred in the early evening hours of July 23, 1964 (about 7:30 p.m.) while he was engaged in a basketball game with other adults at the playground during hours when that area was open to the public. The injuries were sustained when the basketball apparatus suddenly fell upon Jones.

The apparatus consisted of a galvanized iron pipe, approximately 3-1/8 inches outside diameter, implanted in a sleeve which in turn was

sunk into the ground and secured in position by a field of cement poured around the base of the sleeve. From ground level the pipe extended approximately 13 feet into the air. Attached to it was the backboard against which the shots played and the extending ring from which the basket was hung.

The apparatus was installed in 1958 by the National Park Service. It had been inspected regularly by maintenance men of the National Park Service since that date.

The apparatus was not installed in accordance with the method usually employed by the National Park Service in that a hole had been bored through the pipe at or about ground level through which a bolt passed to secure the pipe to the sleeve. Customarily the National Park Service does not use the bolt and sleeve device but sinks a pipe to a depth of three feet in a field of concrete.

Except for a possible cracking of the cement surrounding the base of the pipe there was no apparent indication that the pipe was insecure. The testimony is not exact as to when the crack first appeared or the extent of the crack at or before the time of the accident. There was evidence to conclude that the cracks in the cement were present for an extended period of time prior to the break in the pipe, and the sleeve in which the pipe was secured was visible and capable of inspec-

tion. The supervisor of the playground testified that his safety inspection was limited to a visual inspection but that he had used the basketball apparatus the previous evening and had noticed nothing unusual.

However, experts for both the plaintiff and the defendants agreed and the Court finds that what caused the apparatus to topple was not the cracking of the cement around its base but a breaking of the pipe at or about ground level due to metal fatigue caused by the drilling of the hole through it.

The apparatus weighed approximately 175 pounds. As it fell, Jones was attempting to pick up the basketball. The apparatus struck him on the head and across the back, stunning him momentarily. His head was lacerated. Following the accident Jones was removed by ambulance to Casualty Hospital where the head laceration was sutured and he was x-rayed for fractures. The x-rays proved negative but he was hospitalized for further treatment. He remained in the hospital under treatment for a period of 44 days.*/ Throughout he complained of headache, chest pain, pain in the ankle, pain in the head and dizziness.

---

*/The Court finds it difficult to equate the length of hospital confinement with the injury, considering that x-rays revealed no fractures. However, neither the treatment nor the cost thereof is challenged.

Treatment at the hospital was therapeutic for the most part. Several x-rays proved negative. The use of a sacro-lumbar support was recommended. The plaintiff still complains of pain in the back and continues to wear a support at times although there is no objective evidence of residual injury.*/

At the time of the accident plaintiff was employed as a bus boy by Government Services Inc., at a wage of about $45.00 per week. The parties stipulated and the Court accordingly finds that loss of wages was $715.00. Following the accident plaintiff returned to his prior employment, but later secured employment with Eastern Airlines where he performs work equally as arduous as that previously performed and earns a salary of about $114.00 per week.

DISCUSSION

The District of Columbia asserted the defense of sovereign immunity alleging that the operation of the playground was a governmental function.

Both the District of Columbia and the United States Government alleged that the accident was not due to any negligence on their respec-

---

*/ The plaintiff further alleged that as a result of his injury his vision was impaired and he now is required to wear glasses. The Court finds no evidence of causal connection between the plaintiff's need to wear glasses and this injury. That claim is therefore rejected.

tive parts, and that in any event Jones was contributorily negligent and assumed a risk which would exculpate them from liability.

We turn first to the defense of the District of Columbia that the operation of the playground was a Governmental function and that by reason thereof it enjoyed sovereign immunity from suit in connection with any accident which might happen upon the premises.

The Court rejects this defense by the District of Columbia. To hold otherwise would be to run counter to the recent cases in this Circuit which demonstrate an increasing limitation upon claims by the District of Governmental immunity and freedom from suit. The Court adopts the reasoning of Elgin v. District of Columbia, 119 U. S. App. D. C. 116, 337 F. 2d 152, and the more recent opinion of Judge Holtzoff in Thomas v. Potomac Electric Power Company, D. C. D. C. Civil No. 1955-61, decided April 18, 1967.

We come then to the question of negligence. The defendants contend that the construction and erection of the apparatus was adequate for purposes for which it was intended; that the apparatus would not have toppled if subjected only to the stresses of normal basketball playing; but that the apparatus had been subjected to other stresses not contemplated in that children were wont to climb the pipe, to hang from the backboard and otherwise subject the apparatus to abuse at times when

the playground was not under its normal supervision; and that no negligence can be imputed to the defendants.

The owner or occupier of property is general charged with a duty of exercising reasonable care to keep the premises in a safe condition. An invitee (and Jones was an invitee) enters the premises upon an implied representation that the area has been prepared and made ready and safe for his reception. He is entitled to expect such care not only in the original construction of the premises, and to any activities of the possessor or his employees which may affect the condition of the permises, but also in inspection to discover actual conditions and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary to assure him protection under the circumstances. (Restatement, Second, Torts § 343-344), Watford v. Evening Star Newspaper Co., 211 F. 2d 31 (D. C. Cir. 1954).

The Court does not agree with the basic contention that the apparatus was adequately installed for the purposes for which it was intended. The Director of Maintenance testified that he had never seen a pipe installed in a manner in which this pipe was installed, and that he would not have installed it in the manner in which it was installed. Two expert witnesses (one for the plaintiff and one for the defendants) testified that the cause of the break was metal fatigue; that metal fatigue

can be expected when a hole is inserted through a pipe in the manner in which it was inserted here; and that metal fatigue would eventually lead to a break. The original installation was thus faulty even for the normal purposes for which intended.

Even were we to accept the thesis of the defendants that the apparatus was adequate for the purposes intended and capable of withstanding the stresses normally exerted against an outdoor basketball apparatus (e.g., wind pressure, the impact of bouncing balls, and the impact of people colliding with the pole) we would still be constrained to find that the defendants were negligent in the maintenance of the apparatus. The defendants assert that the initial installation was adequate, but that the break was in fact due to the added stresses resulting from the abuse of the pipe by children and vandals subjecting the apparatus to uses for which it was not intended, as for instance climbing the pipe and swinging from the backboard and net ring. But that testimony emphasizes the fact that the playground officials were fully aware that the basketball standard was being subjected to abuse by unauthorized persons during hours when the playground was officially closed, and that to avoid unnecessary vandalism the officials had in fact provided ready access to the premises to permit children and others to enter the playground after hours without breaking the fence or digging under the fence as was their wont to do.

With this knowledge brought home to them the Court does not feel that the defendants can rely upon the defense of intervening cause which was not due to their own negligence. Having knowledge of the activities of the children and the vandals, the duty was incumbent upon the defendants to take that extra caution necessary to render the apparatus capable of withstanding the pressures to which it was actually put rather than the stresses to which it would theoretically be put. Foy v. Friedman, 280 F. 2d 724 (D. C. Cir. 1960), Restatement, Torts § 344 (comment f.) Clearly in the present case there was sufficient notice to the defendants; prior to the injury, to alert the defendants to anticipate resulting harm. Archote v. Travelers Insurance Co., 179 So. 2d 658 (1965).

Both defendants asserted the defenses of contributory negligence and assumption of risk. They rely on two disputed fact situations:

(1) They assert that the cement was cracking and that the plaintiff should have noticed the crack and been on notice of danger. But, as noted above, it was not the crack in the cement which caused the pole to topple; it was the metal fatigue which caused the pipe to break at its base.

(2) Secondly, they assert that the apparatus swayed during the course of the basketball game to the extent that play was interrupted to

permit examination and debate as to whether the game could safely proceed. This, too, was disputed but in any event there was no evidence that any knowledge was brought home to the plaintiff.

An invitee is not required to be on the alert to discover defects which, if he were a mere licensee, he might be negligent in not discovering and he is not held to the high standard imposed on the occupier of the land toward the invitee to discover latent defects.

Further, if this swaying was observed by the six playing adults, and if they were not made aware of the latent defect and concluded, after inspection, that there was no apparent danger, it is fair to assume that their conclusion was the conclusion of reasonable people under all the circumstances, and that they were not in fact forewarned of danger and did not in fact assume an anticipated risk.

CONCLUSIONS OF LAW

In view of the foregoing the Court makes the following conclusions of law:

(1) The Court has jurisdiction of the subject matter.

(2) The District of Columbia as the occupier of the premises was negligent in permitting the use by an invitee of a device which the District of Columbia knew, or should have known, was defective.

(3) The United States was negligent in that as the entity charged with the installation and maintenance of the apparatus it installed a defective device and failed through maintenance to discover the defect and to render the device safe.

(4) The defenses of contributory negligence and assumption of risk have not been established by a preponderance of credible evidence.

It is accordingly the judgment of this Court that the defendants be held liable for and the plaintiff be awarded the following damages:

Casualty Hospital	$1,515.61 *
Dr. James W. Braden	350.00 **
Dr. Stacey L. Rollins	35.00
Sacro-lumbar support	30.00
Loss of wages	715.00 ***
Pain, suffering and inconvenience	3,500.00
Total	$6,145.61

---

* The hospital bill was not questioned by the defendants. This award is subject to a lien of $1,122.00 in favor of the District of Columbia.

** The claimed amount, $630.00, is reduced to adjust for duplicate billings by the hospital and to revise the schedule of visiting fees.

*** This amount was stipulated by the parties.

ORDER

In light of the above findings of fact and conclusions of law, it is this 13th day of June, 1967,

ORDERED that judgment in the amount of $6,145.61 be entered in favor of the plaintiff Robert E. Jones.

/s/ H. F. Corcoran
JUDGE

* * * * * *

[Filed August 14, 1967]

NOTICE OF APPEAL

Notice is hereby given this 14th day of August 1967 that the District of Columbia, one of the defendants named herein, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on June 15, 1967, in favor of the plaintiff and against the District of Columbia.

* * * * * *

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,806

DISTRICT OF COLUMBIA,

Appellant,

v.

ROBERT E. JONES,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

[illegible]
Principal Assistant Corporation
Counsel, D. C.

[illegible]
Assistant Corporation
Counsel, D. C.

[illegible]
Assistant Corporation
Counsel, D. C.

QUESTION PRESENTED

Whether the District of Columbia may be charged with constructive notice of an alleged dangerous condition of a basketball goal post which fell and injured a player on a playground used by the District, where only a trained and experienced metallurgist would have recognized that the unusual manner in which the goal post had been installed many years earlier by the United States would eventually give rise to the metal fatigue which caused the goal post to fall.

I N D E X

Page

SUBJECT INDEX

CASES CITED

UNITED STATES CODE CITED

DISTRICT OF COLUMBIA CODE, 1961, CITED

OTHER AUTHORITY CITED

---

*Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,306

DISTRICT OF COLUMBIA,

Appellant,

v.

ROBERT E. JONES,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the United States District Court for the District of Columbia entered June 15, 1967, in a negligence action (J. A. 2). The jurisdiction of the District Court was apparently invoked under D. C. Code, § 11-521 (Supp. V, 1966). Notice of appeal was filed July 14, 1967. This Court has jurisdiction under 28 U. S. C. § 1291 (1964).

STATEMENT OF THE CASE

The Pleadings

Appellee sued the United States and the District of Columbia for damages for personal injuries (J. A. 1, 7). In his complaint, he alleged that, while playing basketball on the Sherwood Playground at Ninth and G Streets, Northeast, in the District of Columbia, he was injured when struck by a falling basketball apparatus which the defendants, through their agents or employees, had negligently installed or maintained (J. A. 2-5).

In their respective answers, the United States and the District of Columbia denied all allegations of negligence (J. A. 5-6, 10-11), and the case was tried to the court without a jury.

At the conclusion of all the evidence, the United States and the District of Columbia each moved for judgment in its favor. Both motions were denied.

Thereafter, judgment was entered against the United States and the District of Columbia in the amount of $6,145.61 (J. A. 2, 73). Both the United States and the District of Columbia appealed, but the United States later withdrew its appeal (J. A. 2).

The Evidence

In 1958 there was erected, by employees of the United States National Park Service, on the Sherwood Playground at Ninth and G Streets, Northeast, in the District of Columbia, a basketball apparatus, consisting of a hoop, backboard, and supporting post, weighing together 175 pounds (J. A. 31-33).

The usual method used by the National Park Service in installing such basketball apparatus is that a three-inch pole, sixteen feet in length, is set in a field of concrete three feet deep and two feet square (J. A. 32). In installing the apparatus here involved, employees of the Park Service did not, however, follow the usual method (J. A. 32). Instead, a metal sleeve was sunk in a field of concrete and a sixteen-foot pole was set into the sleeve, a hole was drilled through both the sleeve and the pole just below ground level, a bolt was inserted through the sleeve and the pole, and a one-inch layer of concrete was then placed around the pole in such manner as to cover the bolt and sleeve (J. A. 25-26, 28, 38, 55).

At some unspecified time prior to July 22, 1964, the layer of concrete covering the bolt and sleeve had cracked or broken away for a distance of about three-quarters of an inch from the pole so that the bolt and sleeve could be observed by looking downward from a position directly adjacent to the pole (J. A. 22, 24).

On July 22, 1964, appellee, who was then twenty-two years of age, went to the Sherwood Playground at about 6:00 p.m. and, with five other men, commenced to play basketball (J. A. 15-16). After playing several games, appellee was struck on the head and back by the apparatus as it toppled to the ground (J. A. 17). Prior to the collapse of the apparatus, appellee was not aware of any defect in it (J. A. 16).

Dr. Barry Hyman, an Assistant Professor of Engineering at The George Washington University, called by appellee and qualified as an expert witness (J. A. 36-37), testified that prior to trial he had inspected both ends of the broken basketball pole, i.e., the stub of the pole remaining in the ground at the playground and that portion of the pole which separated from it as a consequence of the break (J. A. 38-39). He determined that the break had occurred just below ground level where a half-inch hole had been drilled through the pole (J. A. 38). The cause of the break was "fatigue failure," which began at the places on the pole where holes had been drilled through it (J. A. 40). He stated that the failure was "microscopically" progressive and one from which "* * * you would not necessarily be able to determine any indication of failure being about to occur" (J. A. 40). When asked what could have been done to prevent the metal fatigue and consequent collapse of the pole, Dr. Hyman stated: "They [National Park Service employees] should never have drilled that hole" (J. A. 41).

Called as a witness by the United States, and qualified as an expert, Dr. Melvin R. Myerson, Chief of the Engineering Metallurgical Section, National Bureau of Standards, testified that he examined and tested, jointly with a fellow engineer, the portion of the basketball pole which broke off at the ground (J. A. 53-55, 57). He stated that:

> "We noted that the two holes that had been drilled for the pin had been battered all around. They are deformed.
>
> "And then, we noticed that, apparently, the fracture was a fatigue fracture that had proceeded from each hole in all four directions * * * gradually working around until the only metal left intact was a piece here and a piece here (indicating); and then that being too little metal to support the entire pole, it fell over. * * * " (J. A. 57.)

In answer to the question whether, if a hole had not been drilled through the pole and a bolt inserted, a fatigue fracture would have developed, Dr. Myerson answered:

> "I have to base my answer on the fact that 80 or 90 per cent of all fatigue failures start at some notch or hole and so on, and if these are absent, there is a much greater chance that they will not start. So, based on that, I say that I would be surprised if this were a perfectly smooth pipe that this kind of a fracture would have started. Fatigue is so influenced by surface conditions, conditions of indentations, of holes and so on, as was read, that this has to be a material part of it." (J. A. 58-59.)

It was undisputed that the National Park Service was charged with the duty of inspecting and maintaining the Sherwood Playground so as to insure that the grounds and equipment did not become hazardous to the safety of the users thereof (J. A. 30-31). The Park Service maintained a crew of three maintenance men who inspected the playground on a weekly basis and, when finding any evidence of disrepair, made on-the-spot repairs, where possible (J. A. 34-35). Additionally, the Park Service employed a custodian at Sherwood Playground whose duty it was to inspect and maintain the playground and equipment on a daily basis (J. A. 35).

In connection with its use of the Sherwood Playground for public recreational purposes, appellant had assigned to duty there Fleming Gregory, an employee of fifteen years experience with the District of Columbia, as a Supervisor and Recreation Specialist (J. A. 42-44). Gregory testified that, in the course of his duties at the playground, he made each morning a "sight and/or touch check" of the equipment used on the playground (J. A. 43). He made such a check on the morning of the day of the accident (J. A. 43). He stated that, on July 21, 1964, the day prior to the accident, he had participated in a basketball game using the particular basketball apparatus which toppled on July 22, 1964 (J. A. 44). If there had been anything apparently wrong

with the apparatus, he said that "I am pretty sure I would have observed it" (J. A. 44).

STATEMENT OF POINTS

The trial court erred in finding that the District of Columbia had actual or constructive notice of a dangerous condition of the basketball apparatus which fell and injured appellee.

SUMMARY OF ARGUMENT

The District of Columbia is not an insurer of the safety of those who make use of its public parks and playgrounds. The District may be found liable only where it is shown that it had either actual or constructive notice of a dangerous condition which causes injury. Because the District clearly had neither actual nor constructive notice of a dangerous condition of the basketball apparatus here involved, the court below erred in finding it negligent and in entering judgment on such finding.

ARGUMENT

The trial court erred in finding that appellant had actual or constructive notice of a dangerous condition of the basketball apparatus involved.

It has been held consistently that a municipality is not an insurer of the safety of those who make use of public parks and playgrounds. Thus, it is not liable for every injury occurring thereon because of a dangerous condition of either the grounds or equipment. A municipality, however, may be " * * * liable for dangerous conditions existing in its park * * * [if] it created them or had actual knowledge thereof and failed to take proper action to eliminate the same, or * * * [if] they were created by others and * * * [it] had constructive knowledge of the existence of same on its premises for such a period of time that a reasonably prudent person in the exercise of ordinary care would have discovered and eliminated the same." Adams v. United States, 239 F. Supp. 503, 506 (E. D. Okla., 1965). See also: 63 C. J. S., MUNICIPAL CORPORATIONS, § 907.

In finding appellant negligent, the trial court concluded that:

> "The District of Columbia as the occupier of the premises was negligent in permitting the use by an invitee of a device which the District of Columbia knew, or should have known, was defective." (J. A. 71.)

The record, however, is completely devoid of any evidence to support a finding that appellant had, or should have had, notice of a dangerous or defective condition of the basketball apparatus which caused appellee's injuries.

There is no evidence whatsoever that appellant had actual knowledge that the basketball apparatus was in any way defective or dangerous.

The Supervisor and Recreation Specialist assigned to the Sherwood Playground (a District employee with fifteen years experience) testified that, although he was not directly concerned with maintenance of the playground and facilities, he made an inspection of the basketball apparatus prior to the accident. He said that, just one day preceding the accident, he had played basketball on this particular court and that, moreover, on the very day of the accident, he had conducted a safety "sight and/or touch check" of the apparatus. (J. A. 43.) He testified: "I noticed nothing of any nature that would indicate that there was some defect or any default in the pole" (J. A. 47). He added that, had there been anything wrong with it, "I am pretty sure I would have observed it" (J. A. 44).

Some 10 or 15 minutes prior to the collapse of the apparatus, it began to shake when the ball hit the backboard. The basketball game

was thereupon temporarily suspended while several players and spectators inspected the apparatus but concluded that "it wasn't anything serious" and resumed play. (J. A. 50-52.) There is no indication, however, that this was observed by or made known to any employee of appellant.

The usual method used by the National Park Service in installing basketball apparatus at area playgrounds is to set a sixteen foot metal pole in a field of concrete three feet deep and two feet square (J. A. 32). The pole is not otherwise bolted or braced (J. A. 32). The usual method was not, however, followed by the National Park Service in installing the particular basketball apparatus here involved. Rather, a metal sleeve was sunk in a field of concrete and a sixteen foot pole was set into the sleeve, a hole was then drilled through both the sleeve and the pole just below ground level, a bolt was inserted through the sleeve and the pole, and a one-inch layer of concrete was then placed around the pole in such manner as to cover the bolt and the sleeve (J. A. 25-26, 28, 38, 55).

Both the expert witnesses who testified attributed the accident to the unusual method of construction utilized here (J. A. 41, 57). Both concluded that the metal fatigue occurred at the two points on the pole where the hole had been drilled through it (J. A. 41, 57-58). Dr.

Myerson, the Government expert, when asked whether there would have been a metal fatigue failure if the holes had not been drilled in the manner they were, replied: " * * * I don't think there would have been" (J. A. 58).

The finding of the trial court that appellant was charged with notice of a defective or dangerous condition of the basketball apparatus was apparently based on evidence that, at some unspecified time before the apparatus fell, the layer of concrete covering the bolt and the sleeve had cracked or broken away for about three-quarters of an inch from the pole[1] so that the bolt and sleeve could be observed by looking downward from a position directly adjacent to the pole. The court reasoned that, if such an inspection had been made by appellant, it would have discovered the existence of the bolt and sleeve arrangement and that this knowledge should have placed it on notice that the pole was potentially dangerous and likely to fall. The condition of the basketball apparatus which caused it to fall was, however, manifestly of such a nature that, even with knowledge of the bolt and sleeve arrangement utilized

---

[1] Appellee's expert witness testified that whether " * * * the concrete was intact or not was irrelevant" so far as causation of the accident was concerned (J. A. 41), and the trial court so found (J. A. 65).

in its installation, only a trained and experienced metallurgist would have recognized that it was potentially dangerous. The trial judge referred to the condition throughout his opinion as a "latent defect" (J. A. 68, 71). The nature of a latent defect is such that it could not have been discovered by an ordinary inspection. Hyde v. Bryant, 114 Ga. App. 535, 151 S. E. 2d 925 (1966). Appellee's expert witness testified that only a microscopic inspection of the affected part of the pole would have indicated the presence of metal fatigue and that, even if the fracture point were visible "* * * to the eye, you would not necessarily be able to determine any indication of failure being about to occur" (J. A. 40).

The condition of the pole which caused it to fracture and fall was thus not of such a nature that "* * * a reasonably prudent person in the exercise of ordinary care would have discovered" it. Adams v. United States, supra, at p. 506. Manifestly, under these circumstances, it cannot properly be concluded that the District had, or should have had, knowledge of a dangerous condition of the apparatus.

Since the District of Columbia had neither actual nor constructive notice of a dangerous condition of the apparatus, the trial court erred in finding that it was negligent. Woodbury v. District of Columbia, 16 D. C. (5 Mackey) 127 (1886), aff'd. 136 U. S. 450 (1890); Mitchell

v. District of Columbia, 120 U. S. App. D. C. 390, 347 F. 2d 484 (1965); Handy v. Hadley-Luzerne Union Free School District, 227 N. Y. 685, 14 N. E. 2d 390 (1938); Sineno v. State of New York, 9 App. Div. 2d 579, 189 N. Y. S. 2d 387 (1959).

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the court below in favor of appellee and against appellant is erroneous and should, therefore, be reversed.

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellant,
District Building,
Washington, D. C. 20004